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TEACHING TO THE TEST DETERMINING THE APPROPRIATE TEST FOR FIRST AMENDMENT CHALLENGES TO “NO PROMO HOMO” EDUCATION POLICIES

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Abstract

Under the current tests set out in Pickering and its progeny, teachers—particularly LGBT and LGBT allies—are being censored in the classroom with “no promo homo” education policies and laws. Although citizens are granted free speech protections through the First Amendment, public employees such as public school teachers generally receive less protection. The Supreme Court has yet to determine a distinct test for public school teachers, leaving discretion to school districts. Currently, in seven states, legislators explicitly prohibit teachers from positively speaking about or correcting misconceptions on homosexuality. In this current age, these policies negatively impact the teacher’s effectiveness inside of the classroom by distributing sometimes false or

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misleading information and contributing to a hostile environment for both teachers and students. This article suggests one standard that accounts for the new recognition of same-sex rights as a matter of public policy and prohibits viewpoint discrimination.

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I. Introduction

Currently, seven states have enacted “no promo homo” laws that restrict any school-based instruction or activity that could be interpreted as pro-homosexuality.¹ Some of these laws prohibit teachers from positively acknowledging homosexuality by stressing that “homosexuality is not a lifestyle acceptable to the general public.”² Others limit teachings of homosexuality as source material for AIDs prevention or unhealthy sexual habits.³ In doing so, schools relegate homosexuality to a

¹ “No Promo Homo” Laws, GLSEN, <https://www.glsen.org/learn/policy/issues/nopromohomo> [<https://perma.cc/3LG2-TMFH>].

² ALA. CODE § 16-40A-2 (2018).

³ *Id.*

taboo status. These policies are a matter of strong concern for LGBT supporters and families. Many teachers feel compelled to teach material that contradicts their beliefs and identities.

“No promo homo” policies were initially created to supplement sexual health education in prevention of AIDs. Many of the laws were created in the late ‘80s or ‘90s, yet have not been updated to match the technological advancements and legal decisions in light of *Obergefell* and *Lawrence*.⁴ Texas’s policy teaches “that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under Section 21.06, Penal Code.”⁵ In *Lawrence v. Texas*, the Supreme Court held criminalizing homosexuality under Section 21.06 unconstitutional.⁶ Other states demean homosexuality as a means to prevent contraction of AIDS. However, these practices invoke a fallacy and stigma within students. The curriculum negates the fact that heterosexual individuals may also contract AIDS and, generally, LGBT individuals will not all contract the disease. “No promo homo” laws should be repealed because they teach students outdated curriculum and instigate unconstitutional practices.

“No promo homo” laws also raise serious First Amendment concerns for teachers and students alike. The First Amendment of the United States Constitution states, “Congress shall make no law . . . abridging the freedom of speech.”⁷ As a matter of policy, courts defer to school districts to have broad authority in writing curriculum and encouraging social norms unless there is

⁴ See, e.g., ARIZ. REV. STAT. ANN. § 15-716 (2018); OKLA. STAT. ANN. tit. 70, § 11-103.3 (West 2018); ALA. CODE § 16-40A-2 (2018); MISS. CODE ANN. § 37-13-171 (West 2016); S.C. CODE ANN. § 59-32-30 (2016); see also *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁵ TEX. HEALTH & SAFETY CODE ANN. § 163.002 (West 2017).

⁶ *Lawrence*, 539 U.S. at 578–79.

⁷ U.S. CONST. amend. I.

a lack of sufficient justification for the restriction.⁸ The Supreme Court has recognized students' right to receive ideas and has barred explicit regulations—such as removing books from the school's library—that constitute viewpoint discrimination without legitimate justification.⁹ “No promo homo” laws violate both teacher and students' rights, but this article will discuss the ramifications for teachers.

Unfortunately, the Court has not clearly designated protection for teacher speech discussing sexual orientation in schools. School districts reason that allowing teachers to discuss homosexuality in a positive light is inappropriate because it will encourage students to become gay and disrupt school operations. This justification is insufficient because recent data has shown that “no promo homo” laws create an environment of intolerance that causes disorder in school. The harmful effects of “no promo homo” laws on all aspects of school operations reveal the necessity for a clear test to determine teachers' First Amendment rights. It is unclear as to whether teacher speech regarding this topic is subjected to analysis under *Connick-Pickering*, *Garcetti*, or *Tinker*. Part II of this article will discuss the three tests. Part III will analyze the facts under each test and predict the likely outcome of LGBT teachers' claims. Finally, Part IV will conclude with the appropriate test for these claims.

⁸ See *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332 (6th Cir. 2010); Ronny Hamed-Troyansky, *Erasing “Gay” From The Blackboard: The Unconstitutionality of “No Promo Homo” Education Laws*, 20 U.C. DAVIS J. JUV. L. & POL'Y 85, 92–94 (2016).

⁹ *Bd. of Educ. v. Pico*, 457 U.S. 853, 866–67 (1982) (plurality opinion).

II. “No Promo Homo” Laws and their Effects on Schools

Anti-gay education policies facilitate an intolerant culture by barring teachers from speaking positively of homosexuality. In 2015, a national survey from GLSEN, an organization dedicated to facilitating safe school environments for all students, reported that “57.6% of LGBTQ students felt unsafe at school because of their sexual orientation, and 43.3% because of their gender expression.”¹⁰ Students turn to staff for counseling and guidance to rectify their situations. However, the report also stated that “63.5% of the students who did report an incident said that school staff did nothing in response or told the student to ignore it.”¹¹ “No promo homo” laws exacerbate these problems by creating a hostile environment for students. When students attempt to report harassment, teachers are prohibited from acting in a way that advocates for LGBT students.

“No promo homo” laws leave teachers feeling helpless and unable to do their job effectively. Some teachers refuse to mention homosexuality altogether. This leaves LGBT supporters paralyzed to effectively facilitate productive conversations that promote a more tolerant student body. Kimberlee Irvine, an 8th grade teacher, described an instance in 2013 where “her class was discussing a passage in which a character has two dads.”¹² One student thought that this was a typo which created a moment that sidetracked the lesson. The

¹⁰ JOSEPH G. KOSCIW ET AL., GLSEN, THE 2015 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER YOUTH IN OUR NATION'S SCHOOLS xvi (2015).

¹¹ *Id.*

¹² Corinne Segal, *Eight States Censor LGBTQ Topics in School. Now, A Lawsuit Is Challenging That*, PBS NEWS HOUR (Jan. 29, 2017), <https://www.pbs.org/newshour/nation/lgbtq-issues-class-lawsuit-utah> [<https://perma.cc/D8GB-GARW>].

teacher noted that “if I could just answer this, it would create understanding.”¹³ Fast change is needed for the sake of students and teachers to solve the tension between the legality of addressing homosexuality and effectively teaching the curriculum.

Due to “no promo homo” laws, both straight and LGBT teachers fear retaliatory action from schools for speaking positively about LGBT identities. In 2014, Brett Bigham, “the first openly gay educator to be named Oregon Teacher of the Year” was fired months later after he “used the role as a platform to discuss gay rights, bullying and suicide prevention.”¹⁴ His “district saw it as an act of war” and refused his request “to meet with a Gay Straight Alliance (GSA) club at the local high school about suicide prevention . . . because ‘meeting with those students has no value to this district.’”¹⁵ However, after his speech, Bigham attended another GSA meeting where a participant said to him “I feel like what you did, you did for me.”¹⁶ Although students would benefit from reassurance by teachers, “no promo homo” laws outlaw any form of positive speech regarding homosexuality. Ultimately, “no promo homo” laws criminalize positive behavior towards homosexuality by leaving teachers open to retaliatory action.

“No promo homo” laws help to foster hostility towards LGBT students. In 2015, “56.2% of students reported hearing homophobic remarks from their teachers or other school staff, and 63.5% of students

¹³ *Id.*

¹⁴ Laura Frazier, *Oregon 2014 Teacher of the Year Placed on Paid Administrative Leave*, OREGONLIVE (Mar. 21, 2015), https://www.oregonlive.com/education/index.ssf/2015/03/oregon_2014_teacher_of_the_yea.html [https://perma.cc/W3YP-K9AL].

¹⁵ Brett Bigham, *You Can Be Teacher of the Year and Still Get Fired for Being Gay*, BETTER EDUC. (Oct. 26, 2017), <http://educationpost.org/you-can-be-teacher-of-the-year-and-still-get-fired-for-being-gay/> [https://perma.cc/9PR6-VE4Q].

¹⁶ *Id.*

reported hearing negative remarks about gender expression from teachers or other school staff.”¹⁷ By legalizing hate, teachers are permitted to discriminate against students of all ages for their self-expression without facing recourse. On the other hand, teachers attempting to reaffirm students and confront their peers or other students are unfairly treated or fired. Comforting harassed students or mentioning positive aspects of homosexuality would constitute promoting homosexuality in contrast to the school district’s policies. Anti-gay laws transform schools from safe, tolerant spaces for learning into hostile, close-minded arenas for torment.

Current “no promo homo” policies are too general and imprecise to legitimately achieve the district’s purpose in educating students without disruption because they do not specifically instruct teachers on what they can and cannot say about homosexuality. Most recently, the court in Utah discussed this argument as the plaintiff’s sought a repeal of Utah’s anti-gay education law. The plaintiffs claimed that “[t]hese restrictions constitute[d] impermissible content and viewpoint discrimination and also impose[d] an overbroad and impermissibly vague restriction on protected speech.”¹⁸ Both parties dismissed the complaint in return for amended legislation that erased the prohibition of positive speech regarding homosexuality.¹⁹ Liberals and conservatives supported the act, “noting that the revised law continues to promote abstinence

¹⁷ KOSCIW ET AL., *supra* note 10, at xvi.

¹⁸ Complaint for Declaratory and Injunctive Relief at 3, Equality Utah v. Utah State Bd. of Educ., 2:16-CV-01081 (D. Utah Oct. 24, 2016); see Ryan Thoreson, *Utah Repeals ‘No Promo Homo’ Law*, HUM. RTS. WATCH (Mar. 21, 2017), <https://www.hrw.org/news/2017/03/21/utah-repeals-no-promo-homo-law> [<https://perma.cc/PY5T-MJUF>].

¹⁹ *Id.*

outside of marriage in sex education classes.”²⁰ By creating a narrowly tailored education policy that does not prohibit positively discussing LGBT identities, school districts can still carry out their operations.

Efforts to amend “no promo homo” laws without litigation have been met with reluctance. In the past, Alabama’s law referenced “an anti-sodomy law that ha[d] never been repealed, despite a federal ruling.”²¹ In 2013, many LGBT supporters pushed for amending or repealing the state policy.²² After four years, “[t]he Alabama Department of Education removed this language from its curriculum in July, defying the state law and deleting it from the department’s content standards.”²³ It is uncertain whether the same success can occur in the other seven states due to limited supporters’ resources and tense political climates. Litigation would put more pressure on legislative agents to quickly create change.

III. The Potential Legal Tests That Apply to “No Promo Homo” Laws

A. *Connick* and *Pickering*

Under the *Connick-Pickering* test, the employee, speaking as a citizen, must be commenting on a matter of public concern to be entitled to First Amendment protection.²⁴ A matter of public concern relates to “issues of ‘political, social, or other concern to the community.’”²⁵ The context, content, and form of the statements determine whether the employee is speaking on a matter

²⁰ *Id.*

²¹ ALA. CODE § 16-40A-2; Segal, *supra* note 12.

²² Segal, *supra* note 12.

²³ *Id.*

²⁴ *Connick v. Myers*, 461 U.S. 138, 147 (1983).

²⁵ *Id.* at 146.

of public concern.²⁶ Courts utilize a balancing test when applying this standard.²⁷

During the late 1960s, the U.S. Supreme Court addressed the First Amendment rights of public employees to prevent public employers from circumventing the Constitution.²⁸ A public employee is employed by the government. In *Pickering v. Board of Education*, the Court held that a teacher's First Amendment rights were violated when he was fired for releasing a letter criticizing the use of school board funds.²⁹ In that case, the school board organized a public vote to approve proposals for new school buildings.³⁰ After several letters were published and the proposal was defeated twice, the employee, Mr. Pickering, submitted a newspaper article describing the negative effects of the board's indecision on students.³¹ In response, the school board fired Mr. Pickering.³² The board determined the letter contained false statements that undermined the school's operations.³³

The Court defined the general guidelines for public employee speech. Under the *Pickering* test, the employee must speak on a matter of public concern as a citizen to be entitled to protection under the First Amendment.³⁴ A matter of public concern relates to "issues of 'political, social, or other concern to the community.'"³⁵ Due to the public nature of the board's

²⁶ *Id.*

²⁷ *Id.*

²⁸ Stephen Elkind & Peter Kauffman, *Gay Talk: Protecting Free Speech for Public School Teachers*, 43 J.L. & EDUC. 147, 156 (2014).

²⁹ 391 U.S. 563 (1968).

³⁰ *Id.* at 566.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 567.

³⁴ *Id.* at 565.

³⁵ Hamed-Troyansky, *supra* note 8.

vote, the Court considered Pickering's speech a matter of public concern. Next, the public employee must be speaking as a citizen to be entitled to First Amendment protection. When the teacher's speech is not knowingly or recklessly false, the speech is treated as that of a member of the general public.³⁶ The board provided no evidence that showed the teacher made his allegedly false statements recklessly or knowingly.³⁷ In this case, the employee was speaking on a matter of public concern as a citizen and was entitled to First Amendment protection.

The school district attempted to argue that public employees gave up their First Amendment rights completely while at work. The Court rejected the notion that teachers would relinquish their First Amendment rights commenting on matters that they would otherwise freely exercise as citizens.³⁸ In doing so, the Court utilized a balancing test to weigh the school administration's interest in limiting the teacher's opportunities to speak in a public forum with the teacher's interest in making a contribution as a member of the general public.³⁹ The Supreme Court recognized that the state has a strong interest in maintaining operations through its employees.⁴⁰ The Court noted that in some contexts "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions."⁴¹ Therefore, teachers' interest in speaking at their workplace was an important interest. The Court also acknowledged the importance of a teacher's freedom in speaking on such matters without retaliation.⁴²

³⁶ *Pickering*, 391 U.S. at 583.

³⁷ *Id.*

³⁸ *Id.* at 568.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 572.

⁴² *Id.*

Ultimately, the Court held that the state's interest did not outweigh the public citizens' speech.⁴³

For at least 15 years, teachers' speech had been universally protected under the First Amendment.⁴⁴ In *Connick v. Myers*, the Court modified the *Pickering* analysis and held that the public employee was not entitled to protection.⁴⁵ In *Connick*, Ms. Myers, an Assistant District Attorney, opposed her transfer to another location.⁴⁶ Upon seeing that others did not share her same views, Myers released "a questionnaire soliciting the views of her fellow staff members concerning the office transfer policy."⁴⁷ Myers later refused to transfer.⁴⁸ The District Attorney, Connick, fired Myers for insubordination that interfered with working relationships.⁴⁹ Myers argued that her First Amendment rights had been violated and won in the District Court pursuant to *Pickering*.⁵⁰ The Supreme Court granted certiorari after it was affirmed by the court of appeals.⁵¹

The Court reversed, holding that Myers' speech was primarily a matter of private interest, not a matter of public concern subject to protection under the First Amendment.⁵² Myers' speech was a matter of public concern "in only a most limited sense" based on a determination from the "content, form, and context of a given statement, as revealed by the whole record."⁵³ The Court held that speech that is purely personal and does

⁴³ *Id.* at 571–72.

⁴⁴ *Connick v. Myers*, 461 U.S. 138, 142 (1983).

⁴⁵ *Id.*

⁴⁶ *Id.* at 140.

⁴⁷ *Id.* at 141.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 142.

⁵² *Id.* at 154.

⁵³ *Id.* at 147, 154.

not include public concern is not protected speech.⁵⁴ On the other hand, Connick's actions were reasonable due to the "disruptive potential" of at least one question.⁵⁵ Although aspects of the questionnaire concerned matters of public concern, the employer was given deference because close-working relationships were vital to "fulfilling [the] public responsibilities" of the job.⁵⁶

The *Connick* Court's analysis of the statement's context unfairly restricted the employee's speech.⁵⁷ Justice Brennan reasoned in his dissent that the Court incorrectly weighed the context of Myers' statement against the employer's need to restrict her speech.⁵⁸ Myers released the questionnaire at her job, so it created the potential for disturbing the work environment.⁵⁹ Justice Brennan reasoned that Connick's fear was enough to outweigh the employee's speech protections.⁶⁰ In doing so, the holding arguably robbed the public of information crucial to assess elected officials, such as operations regarding transfers.⁶¹ The Court held that Myers' speech was not protected under the First Amendment.⁶²

B. *Garcetti*

Furthermore, the Court continued its restriction on the First Amendment rights of public employees in *Garcetti v. Ceballos*.⁶³ In *Garcetti*, the Court held that the First Amendment does not protect public employees'

⁵⁴ *Id.* at 147.

⁵⁵ *Id.* at 167 (Brennan, J., dissenting).

⁵⁶ *Id.* at 168.

⁵⁷ *See id.*

⁵⁸ *Id.* at 157.

⁵⁹ *Id.* at 153 (majority opinion).

⁶⁰ *Id.* at 168 (Brennan, J., dissenting).

⁶¹ *Id.* at 170.

⁶² *Id.* at 154 (majority opinion).

⁶³ *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

speech made on the job while serving a duty.⁶⁴ In *Garcetti*, the plaintiff alleged that he suffered “retaliatory employment actions” in response to incriminating testimony that he gave while on the job.⁶⁵ As deputy prosecutor, the plaintiff wrote a disposition memorandum recommending the dismissal of a case on the basis of purported governmental misconduct in obtaining a search warrant.⁶⁶ The Court reasoned that *Garcetti* had no First Amendment protection due to the memorandum being written while in his official capacity as a public employee.⁶⁷ Therefore, he was not protected from punishment by his supervisors.

Unlike private citizens, the opinions of public employees may interrupt the efficiency or effectiveness of government operations.⁶⁸ The Government has a “heightened interest[] in controlling speech made by an employee in his or her professional capacity.”⁶⁹ Under *Garcetti v. Ceballos*, three conditions must be met to determine whether a public employee’s purported speech is protected under the First Amendment. First, the matter must be of public concern.⁷⁰ Second, the employer’s interests in effectively rendering services to the public must outweigh the private citizen’s interest in commenting on the matter.⁷¹ Third, the employee cannot make comments while performing their official duties.⁷²

The majority declined to decide whether or not to apply this test to teachers because “[w]e need not, and for that reason do not, decide whether the analysis we

⁶⁴ *Id.* at 426.

⁶⁵ *Id.* at 414–15.

⁶⁶ *Id.*

⁶⁷ *Id.* at 421.

⁶⁸ *Id.* at 418.

⁶⁹ *Id.* at 422.

⁷⁰ *Id.* at 418.

⁷¹ *Id.* (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 566, 568 (1968)).

⁷² *Id.* at 419.

conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”⁷³ Three dissenting opinions in *Garcetti* opposed the idea of expanding this view to educators in support of a concept called “academic freedom.”⁷⁴ Academic freedom is the concept where “teachers necessarily speak and write ‘pursuant to . . . official duties.’”⁷⁵ In a moment of possible foreshadowing to the present issue, Justice Souter’s dissent noted that

private and public interests in addressing . . . threats to health and safety can outweigh the government’s stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.⁷⁶

The issue of whether teachers are protected by the First Amendment when speaking on public matters while on the job is still open.

C. *Tinker*

The Court had previously addressed the appropriate test for instances when the employer’s fear or hesitation leads to an employee’s speech restriction.⁷⁷ In accordance with the *Connick-Pickering* balancing test, the Court may later apply the standard found in *Tinker v. Des Moines Independent Community School District* to analyze speech in school.⁷⁸ Under *Tinker*, the Court held that the interest to protect employees from retaliation

⁷³ *Id.* at 425.

⁷⁴ *Id.* at 438 (Souter, J., dissenting).

⁷⁵ *Id.* at 438.

⁷⁶ *Id.* at 428.

⁷⁷ See generally, *Pickering v. Bd. of Educ.*, 391 U.S. 566, 568 (referring to the effort to strike a balance between the interests of public citizens and the interests of the state on matters of public concern).

⁷⁸ 393 U.S. 503 (1969).

after expressing critiques of public importance will be weighed against the employer's fears of disruption.⁷⁹ Unlike *Garcetti*, the Court will only defer to school officials when there is substantial evidence to support that the censored speech contradicts the school's mission.⁸⁰ Additionally, the speech must create a material interference with the school's activities.⁸¹ School districts may attempt to defend their actions when there is a reasonable expectation for disruption by students or faculty.⁸² Speech restrictions will be justified with a showing that the prohibition is based on more than a "mere desire to avoid the discomfort or unpleasantness [of an] unpopular viewpoint."⁸³ The Constitution prohibits viewpoint discrimination that specifically targets one side of an opinion that is unaccepted by society.⁸⁴

A prohibition singling out a particular viewpoint is impermissible under the First Amendment.⁸⁵ In *Tinker*, the school allowed other students to wear different types of political and religious symbols.⁸⁶ Only the students who were protesting with armbands were suspended.⁸⁷ This indicated that the prohibition was only for a certain political opinion.⁸⁸ Provided there is no evidence justifying restrictions on speech, students and teachers are entitled to freely express their views.⁸⁹ Reasonable speech restrictions from public employers

⁷⁹ *Id.* at 509.

⁸⁰ *Id.* at 513; see *Garcetti*, 547 U.S. at 422–23 (noting that in general, supervisors must ensure employees' official communications promote the employer's mission).

⁸¹ *Tinker*, 393 U.S. at 513.

⁸² *Id.*

⁸³ *Id.* at 509.

⁸⁴ *Id.* at 508–09

⁸⁵ *Id.* at 511.

⁸⁶ *Id.* at 510.

⁸⁷ *Id.* at 510–11.

⁸⁸ *Id.* at 511.

⁸⁹ See *id.*

must be viewpoint neutral and equally administered to all public employees.

In *Tinker*, a school district banned students from protesting against the Vietnam War because it feared the protests would cause disruptions to school's activities.⁹⁰ The *Tinker* Court held that a mere fear of disruption is not enough to restrict the students' or teachers' constitutionally-protected speech.⁹¹ The school district suspended all the students.⁹² The children and their parents argued that the suspension violated their First Amendment rights.⁹³ The district court ruled for the school district.⁹⁴ On appeal, the Supreme Court reversed the decision.⁹⁵

The problem remains regarding *Tinker*'s application to teachers. The Court held that neither students nor teachers lose their First Amendment rights once they enter a school.⁹⁶ However, the plaintiffs were solely students. Many of the facts and analysis applied to students' speech. Without an explicit limitation to students, other courts may use *Tinker* to analyze teacher speech regarding viewpoint discrimination over public matters. On the other hand, courts may read this decision as narrowly applied to students.

IV. Analysis of “No Promo Homo” Laws Under Each Test

A. Connick and Pickering

LGBT teachers could claim that the standard for evaluating their speech needs to be the two-prong

⁹⁰ *Id.* at 508.

⁹¹ *Id.*

⁹² *Id.* at 504.

⁹³ *Id.* at 505.

⁹⁴ *Id.* at 504–05.

⁹⁵ *Id.* at 514.

⁹⁶ *Id.* at 506.

Connick-Pickering test. Following the reasoning in Pickering, teachers, especially those that identify as LGBT, are able to be well-informed on areas of sexual orientation.⁹⁷ Teachers have a close relationship with students and interact with them on a daily basis, so being able to speak positively about homosexuality will increase their effectiveness. Anti-gay laws threaten teachers with retaliation for non-compliance. This is exactly the opposite outcome that Justice Marshall and the *Pickering* Court wanted because teachers are legally fired for speaking on the matter at their workplace.

The freedom to speak positively about homosexuality is a matter of public concern. Under the *Connick-Pickering* test, the employee, speaking as a citizen, must be commenting on a matter of public concern to be entitled to First Amendment protection.⁹⁸ A matter of public concern relates to “issues of ‘political, social, or other concern to the community.’”⁹⁹ The context, content, and form of the statements determine whether the employee is speaking on a matter of public concern.¹⁰⁰ Recent political and legal events have designated homosexuality as a matter of public concern.¹⁰¹ Cases like *Obergefell v. Hodges* recognized the historical developments that have addressed the political and social concerns of LGBT citizens in both positive and negative ways.¹⁰² In *Obergefell*, the Supreme Court noted the attitude shifts that have led more LGBT citizens to live an open and public lifestyle.¹⁰³ As a result of *Obergefell*,

⁹⁷ See *Pickering v. Bd. of Educ.*, 391 U.S. 566, 572 (1968).

⁹⁸ *Tinker*, 393 U.S. at 568.

⁹⁹ *Connick v. Myers*, 461 U.S. 138, 146 (1983).

¹⁰⁰ *Id.* at 147.

¹⁰¹ See generally *Obergefell v. Hodges*, 135 S.Ct. 2584, 2596 (2015).

¹⁰² *Id.*

¹⁰³ *Id.*

society has afforded LGBT citizens the same marital rights as heterosexual individuals.¹⁰⁴

Instead, school districts may argue that this speech reflects private matters. However, the ability to speak positively on homosexuality would not be limited to LGBT teachers. There is also no indication that LGBT teachers would share intimate information with their students when speaking positively about homosexuality. Many heterosexual teachers are able to talk positively about heterosexual relationships or friendships without sharing intimate details. Increasing numbers of students come from homosexual families or have LGBT friends. Students' perspectives on issues surrounding family, work, and political matters concern public interests, regardless of sexual orientation. All teachers should be able to speak positively about homosexuality in an objective way that separates their personal life from their professional job to create a more holistic and empathetic understanding in students.

Next, the public employee must be speaking as a citizen to be entitled to First Amendment protection.¹⁰⁵ As long as teachers do not make knowingly or recklessly false statements about homosexuality, their speech is treated as that of a member of the general public.¹⁰⁶ If teachers make knowingly or recklessly false statements, they are not speaking as a member of the general public and no longer enjoy constitutional protection. The repeal of "no promo homo" laws would allow teachers to speak truthfully about issues of homosexuality. Similarly to *Pickering*, teachers could claim that they should enjoy protection for speech that they would otherwise enjoy as a public citizen.¹⁰⁷

Lastly, the court must weigh the school administration's interest in limiting the teacher's

¹⁰⁴ *Id.*

¹⁰⁵ *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

¹⁰⁶ *See id.* at 574.

¹⁰⁷ *Id.* at 565.

opportunities to speak in a public forum with the teacher's interest in contributing as a member of the general public.¹⁰⁸ The state has a strong interest in maintaining school operations by regulating its teachers.¹⁰⁹ However, teachers would have a stronger interest in being able to speak on matters without fear of retaliation.¹¹⁰ Additionally, teachers could provide evidence that they have interests in educating and comforting students. It would be difficult for schools to show that speaking positively on homosexuality would have catastrophic or substantial effects on the operations of schools.

Generally, if LGBT teachers were to undergo analysis under *Connick-Pickering* test, the courts would recognize that teachers' First Amendment rights are protected.¹¹¹ Currently, teachers who directly contradict the anti-gay statutes in place suffer retaliatory action or harassment from their peers. These actions would not withstand scrutiny under *Connick-Pickering* because the interests of the state do not outweigh the interest to protect employees from retaliation for voicing critiques that could benefit the community.¹¹² School districts must become more tolerant as the rights and privileges of LGBT individuals become recognized.

B. *Garcetti*

The Court's decision in *Garcetti v. Ceballos* left the question of teacher speech made on school grounds open to interpretation. Most circuits have abstained from addressing whether teachers are subjected to *Garcetti*'s

¹⁰⁸ *Id.* at 568.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 572.

¹¹¹ *Pickering*, 391 U.S. 563.

¹¹² *Id.*

analysis.¹¹³ Yet, some circuits have applied *Garcetti* to hold that teachers' First Amendment rights were not violated.¹¹⁴ The Supreme Court has not resolved this dispute amongst circuits as to whether teachers have First Amendment protection when speaking among students in their work capacity. A case regarding teachers' rights to positively discuss homosexuality in "no promo homo" states could provide a solid affirmative answer if the Court proceeds to use either the *Connick-Pickering* or *Tinker* test.

However, there is a possibility that the Court will extend *Garcetti* to teacher speech. If so, the Court will likely hold that teachers do not have First Amendment protection while speaking on the job, regardless of whether the matter is of personal concern. The teachers would likely lose because they are speaking on the job.¹¹⁵ This prong would restrict protection for every statement made during school hours and within the school building. School districts would reason that they have a heightened interest in controlling speech made by employees in their official capacity because it directly affects their operations. Teachers may present evidence that their speech would address misconceptions or supplement the curriculum rather than negatively affect their operation. However, teachers are unlikely to succeed because schools are essentially "hiring speech" that must succumb to their perspectives on curriculum.¹¹⁶

Courts could restrict the implementation of *Garcetti*'s analysis to limited situations where it is

¹¹³ See *Lee v. York Cty. Sch. Div.*, 484 F.3d 687, 694 (4th Cir. 2007); *Borden v. Sch. Dist.*, 523 F.3d 153, 171 n.13 (3d Cir. 2008).

¹¹⁴ *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954 (9th Cir. 2011); see *Mayer v. Monroe Cty. Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007).

¹¹⁵ *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

¹¹⁶ *Mayer*, 474 F.3d at 479.

essential to restrict teacher's speech due to the topic's nature.¹¹⁷ However, this need does not apply to homosexuality in "no promo homo" states. Restrictions on teacher speech that relegate them to only speak negatively about homosexuality render teachers ineffective in the classroom by damaging the positive environment in schools, perpetuating a culture of intolerance, and often disseminating outdated and misleading information to students. The *Garcetti* holding enables communities to quietly "promote intolerance of homosexuality and strip teachers of their constitutional right to discuss homosexuality with their students in certain situations."¹¹⁸

C. *Tinker*

Teachers would meet more success if the Supreme Court used the *Tinker* analysis.¹¹⁹ Under *Tinker*, school districts may not restrict speech surrounding sexual orientation merely because it may cause a disruption.¹²⁰ There must be substantial evidence that supports the school districts' belief that the speech conflicts with the schools' mission and that it will cause a material disturbance in school activities.¹²¹ This is a higher burden on school districts to meet. In doing so, the Court may determine that some school districts simply do not agree with homosexuality. However, the Constitution and legal precedent protect speech that may be disliked by the masses.¹²² Teachers may counteract school districts' claims by bringing data that shows the positive

¹¹⁷ See *Johnson*, 658 F.3d at 966; *Mayer*, 474 F.3d at 479.

¹¹⁸ Elkind & Kauffman, *supra* note 28. See *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332 (6th Cir. 2010).

¹¹⁹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

¹²⁰ *Id.* at 509.

¹²¹ *Id.* at 513.

¹²² *Id.* at 509.

sentiment towards homosexual enfranchisement or the negative impact “no promo homo” policies have on the academic, mental, and emotional state of LGBT students.

The strongest claim for teachers against “no promo homo” laws are those that allege viewpoint discrimination. Teachers may assert that “no promo homo” laws are not neutral. These policies do not punish those who refuse to talk about homosexuality or only talk negatively about the topic. Instead, they punish those who speak positively about homosexuality, which amounts to viewpoint discrimination. This has the harmful effect of stifling students’ growth and understanding of a controversial topic. On the other hand, school districts may counter-argue that the policy is nevertheless justified because it is “narrowly tailored to further a ‘substantial’ state interest in preventing a disruption.”¹²³ Schools may also argue that this restriction applies to all teachers and that it does not discriminate one viewpoint. However, schools are likely to fail this requirement because it only punishes those that speak positively about homosexuality.

Teachers should be allowed to discuss sexual orientation as it pertains to the curriculum to support LGBT students because “there is no precedent that LGBT advocacy . . . would ever create a disruption sufficient to justify this limitation.”¹²⁴ The Tenth Circuit has recognized that speech that “substantially addresses LGBT issues” by making “statements aimed at legal and political change” are core protected speech under the First Amendment.¹²⁵ This is not to say that teachers should be allowed to talk freely about homosexuality at any time. Teachers’ speech must be reasonably related to

¹²³ Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 71 (1983).

¹²⁴ Jillian Lenson, *Litigation Primer Attacking State “No Promo Homo” Laws: Why “Don’t Say Gay” Is Not O.K.*, 24 TUL. J.L. & SEXUALITY 145, 153 (2015).

¹²⁵ *Id.*

the schools' mission and for the purpose of effectively running school operations to be protected.

V. Conclusion

Whether teacher speech is entitled to constitutional protection has yet to be addressed by the U.S. Supreme Court. Currently, the Supreme Court has not designated a test to apply for teacher speech in school. "No promo homo" laws restrict teacher speech advocating homosexuality. Without guidance from the Supreme Court, lower courts have broad discretion in upholding these discriminatory policies.

In evaluating public employees' First Amendment rights, the Court has recognized three tests: the *Connick-Pickering* test,¹²⁶ the *Garcetti* test,¹²⁷ and the *Tinker* test.¹²⁸ The Court declined to assess teacher speech under the *Garcetti* test because the question in that case did not call for it. As it stands, two of the three choices would result in a win for teachers, while one would grant deference to school districts without much regard to the public nature of the speech. The Supreme Court should stand by their original decision and not apply *Garcetti* to "no promo homo" laws.

Furthermore, "no promo homo" laws are written to impermissibly discriminate against one viewpoint. The *Garcetti* test does not address this issue. On the other hand, the *Tinker* test enables speech that dignifies all students by protecting "unpopular" speech that is targeted by unjustified restrictions. Currently, teachers only face disciplinary action for advocating on behalf of their LGBT students. This reasoning strays from the Court's original intention of protecting public employees

¹²⁶ *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

¹²⁷ *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

¹²⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

from retaliation due to their criticisms and circumvents prior Supreme Court decisions.

As stated by Equality Utah's Executive Director Troy Williams at the organizations' annual fundraiser, "[t]he time has come to end the stigma and strike 'no promo homo' from state law."¹²⁹ States should allow teachers to present ideas on both sides and allow students to come to their own conclusions to avoid viewpoint discrimination. Teachers should work as facilitators to the conversation and attempt to mitigate any misconceptions without imposing their own personal beliefs upon students to prevent overstepping their First Amendment protection. The level of teacher control should be dependent on the grade level with more guidance being implemented for elementary and more facilitation and mediation given in high school courses. School districts will survive court scrutiny by implementing viewpoint-neutral regulations that enable teachers to control the discussion in classrooms while validating student identities.

¹²⁹ Jennifer Dobner, *In A National First, LGBT Advocates Sue Utah Schools Over 'Anti-Gay' Laws*, SALT LAKE TRIB. (Oct. 25, 2016), <http://archive.sltrib.com/article.php?id=4494330&ittype=CMSID&fullpage=1> [<https://perma.cc/N3N9-SHEA>].